

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARIA SAWICKI and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Brooklyn, NY

*Docket No. 99-202; Submitted on the Record;  
Issued August 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that she refused to accept suitable work.

On March 17, 1992 appellant, then a 41-year-old revenue agent, filed a claim for carpal tunnel syndrome. The Office initially accepted that appellant's right carpal tunnel syndrome was causally related to her employment and authorized decompression surgery, which was performed on November 7, 1992 by Dr. Julian Zweig. Subsequently, the Office accepted that appellant's left carpal tunnel syndrome was causally related to her employment and authorized surgery on her left wrist.

The Office paid appellant compensation for intermittent absences from work from March 13 to September 4, 1992 and for total disability from September 13, 1992 until she returned to her regular duties on February 24, 1993. The Office also accepted that appellant sustained a recurrence of disability beginning April 11, 1994 and resumed payment of compensation for temporary total disability on that date.

By letter dated March 1, 1996, the employing establishment offered appellant a position as an internal revenue agent – PRP coordinator, stating that appellant would review cases and write or dictate review comments. The offer stated, "Case writing and computer work will not exceed more than one hour per day." On March 10, 1996 appellant declined the offer on the basis that her attending physician, Dr. Zweig, stated that she remained totally disabled. By letter dated June 25, 1996, the Office advised appellant that it had determined that the employing establishment's offer was suitable and that her refusal of this employment without reasonable cause would result in termination of her compensation. The Office allotted appellant 30 days to respond. By letter dated June 29, 1996, appellant replied that she had refused the employing establishment's offer on the basis that her attending physician considered her totally disabled.

By letter dated July 29, 1996, the employing establishment offered appellant a position as an internal revenue agent -- PSP coordinator. The offer stated that this position was "specifically within the limitations given by the reporting physician." By letter dated September 11, 1996, the Office advised appellant that the amended offer of employment sent to her by the employing establishment on July 29, 1996 did not affect its determination that the position was suitable. The Office stated that, in view of appellant's failure to respond to the amended job offer within the 15 days allotted by the employing establishment, it was assumed that she was declining the offer for the same reason expressed in her June 29, 1996 letter. The Office found this reason insufficient and allotted appellant 15 days to accept the position or have her compensation terminated. She did not accept the offered position.

By decision dated November 5, 1996, the Office terminated appellant's employment effective that date on the basis that she refused to accept suitable work. She requested a hearing, which was held on March 18, 1998. By decision dated May 29, 1998, an Office hearing representative found that the Office properly terminated appellant's compensation on the basis of her refusal of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.<sup>1</sup> To justify termination of compensation, the Office must establish that the work offered was suitable.<sup>2</sup>

The Board finds that the Office improperly terminated appellant's compensation on the basis that she refused to accept suitable work.

The Office has not established that the position offered to appellant by the employing establishment on July 29, 1996 was suitable. There is a conflict of medical opinion on appellant's ability to work between her attending physician, Dr. Zweig, and the physician to whom the Office referred appellant for a second opinion evaluation, Dr. Gregory J. Menio. In a report dated November 20, 1995, Dr. Menio stated that, due to her bilateral carpal tunnel syndrome, appellant was unable to return to the job she held when injured, as she could not type or write more than three hours per day. In a work tolerance limitations report dated December 14, 1995, Dr. Menio indicated appellant could type one hour and write one hour per day. In a report dated February 19, 1996, Dr. Zweig stated that appellant's "persistent bilateral carpal tunnel syndrome ... has prevented [her] from returning to any form of useful employment and since both hands are involved, she is totally disabled." Dr. Zweig reiterated this position in a report dated September 1, 1996, stating, "[I]t would remain my opinion that she [is] totally disabled because of ongoing conditions of compression of the median nerves in both hands." Drs. Menio and Zweig are both Board-certified specialists and both list hand surgery as one of their specialties. Their reports are equally rationalized and come to opposite conclusions on

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<sup>1</sup> 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

<sup>2</sup> *David P. Camacho*, 40 ECAB 267 (1988).

appellant's ability to work. Given this conflict of medical opinion, the Office has not met its burden of establishing that the position offered by the employing establishment was suitable.

Moreover, the Board notes that an offer of employment by an employing establishment must include a description of the duties of the position and of the physical requirements.<sup>3</sup> The employing establishment's March 1, 1996 offer complied with these requirements, but, according to a report of a rehabilitation counselor hired by the Office, the employing establishment stated on June 13, 1996 that the position offered on March 1, 1996 was no longer available. This led to the employing establishment's July 29, 1996 offer of a different position. While these positions are both coordinator positions and may be similar, the Board is unable to ascertain if the duties and the physical requirements of the later offer were the same as in the earlier one, as the July 29, 1996 offer contains no description of the duties or the physical requirements.<sup>4</sup> The July 29, 1996 offer's statement that the position was "specifically within the limitations given by the reporting physician" is not sufficiently specific to establish that the offer was suitable.<sup>5</sup> In addition, the Office, after determining that the July 29, 1996 offer was suitable, did not allot appellant 30 days to accept it or provide reasons for not doing so, as required by its procedure manual.<sup>6</sup>

The decision of the Office of Workers' Compensation Programs dated May 29, 1998 is reversed.

Dated, Washington, D.C.  
August 25, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski

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<sup>3</sup> *Mark R. Oxley*, 35 ECAB 608; *Charmyn J. Jernigan*, 43 ECAB 207 (1991).

<sup>4</sup> The position description accompanying the July 29, 1996 offer is general, and does not specifically describe the duties of a light or modified position.

<sup>5</sup> *Charlene R. Herrera*, 44 ECAB 361 (1993).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (December 1993).

Alternate Member